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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 339

JAMES J. MOROney, *Petitioner*

v.

J. M. McKIBBEN, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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No.

JAMES J. MORONEY, *Petitioner*

v.

J. M. McKIBBEN, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carl L. Shipley and Samuel Resnicoff, on behalf of James J. Moroney, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above captioned case on May 9, 1957, affirming a judgment of the United States District Court for the District of Columbia granting summary judgment for respondents on July 25, 1956.

OPINION BELOW

The opinion of the court below is reported at page 1-a of the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that removal of a Postmaster of the First Class is a matter almost entirely within the ambit of executive discretion despite the provisions of 39 U.S.C. 31(a)?

2. Whether the court below erred in holding that dismissal of a Postmaster on charges unsupported by substantial evidence of such cause as will promote the efficiency of the Service is beyond the scope of permissible judicial review?

3. Whether an officer appointed by the President can be dismissed by a superior other than the President in the absence of a specific delegation of authority?

4. Whether the Administrative Procedure Act applies to federal personnel actions?

STATUTES AND REGULATIONS INVOLVED

39 U.S.C. 31(a):

> "Postmasters of the first, second and third classes shall hereafter be appointed in the classified civil service without term by the President by and with the advice and consent of the Senate . . ."

5 U.S.C. 863:

> "No permanent or indefinite preference eligible who has completed a probationary or trial period employed in the civil service, . . . shall be discharged . . . except for such cause as will promote the efficiency of the service . . ."

STATEMENT OF THE CASE

Petitioner was appointed to the position of Postmaster of the Pleasantville, New York, Post Office by President Roosevelt in 1935. In 1938, he was reappointed when the provisions of 39 U.S.C. 31(a) went into effect, and served until May 22, 1955, when he was dismissed on charges of having been physically absent from the post office for 4 hours and 16 minutes on August 25, 1954, 2 hours and 2 minutes on September 2, 1954, and 3 hours and 15 minutes on September 22, 1954, in violation of Art. 21, Ch. 1, Post Office Manual, which provides in pertinent part:

> "21 . . . postmasters shall devote not less than 8 hours during the business part of the day to the conduct of their offices and the performance of duties appropriate to their positions."

The charges did not accuse petitioner of being on other than post office business while absent, and no proof was adduced to show that he was on other than post office business while outside the post office during the stated absences. On appeal to the Second Civil Service Region, the Hearing Officer who saw the witnesses and heard the testimony made Findings and Recommendations as follows:

> "It is the finding of this office, based on all of the evidence of record, that the Post Office De-

partment's decision to effect the appellant's removal from the position of Postmaster was improper and was not based upon sustained charges."

The Postal Inspectors conceded they were unable to state that petitioner was not conducting postal business during the periods of alleged absence from the office. No proof was offered to show petitioner devoted less than eight hours a day to his job.

However, on May 15, 1956, the Civil Service Commission Board of Appeals and Review reversed the Regional Office and sustained the charges. On July 25, 1956, the United States District Court for the District of Columbia granted the Government's motion for summary judgment. On May 9, 1957, the United States Court of Appeals for the District of Columbia Circuit handed down a per curiam decision, as follows:

> "The judgment of the District Court is affirmed. Saggau v. Young, U.S. App. D.C. , 240 F. 2d 865; Hargett v. Summerfield, U.S. App. D.C. , 243 F. 2d 29, affirming 139 F. Supp. 876; Williams v. Cravens, 93 U.S. App. D.C. 380, 210 F. 2d 874."

ARGUMENT

I. The Removal of a Postmaster of the First Class Is Not a Matter Committed Almost Entirely to Executive Discretion.

The court below disposed of petitioner's case in a one sentence per curiam decision giving no reasons and citing only *Hargett* v. *Summerfield*, 243 F. 2d 29, and *Saggau* v. *Young*, 240 F. 2d 865, reprinted at pp. 2a and 5a of appendix hereto, both of which it had decided earlier and both of which involved remedy of

presidentially appointed Postmasters. Therefore, the law applied in those cases must be taken to be the law applied in petitioner's case, despite factual differences.

Prior to 1938 all first class Postmasters were appointed by the President by and with the consent of the Senate, with no restrictions on the President's power of removal. In 1938 Congress blanketed these Postmasters into the classified civil service, although they are still appointed and commissioned by the President, and must be confirmed by the Senate. 39 U.S.C. 31(a). After appointment in the classified civil service, it would seem the President's unrestricted power of removal, *Myers* v. *United States*, 272 U.S. 52; *Humphrey's Executor* v. *United States*, 295 U.S. 602; *Shurtleff* v. *United States*, 189 U.S. 311, 315, 316, is now severely curtailed by the Lloyd-LaFollette Act (5 U.S.C. 652) and the Veterans Preference Act (5 U.S.C. 863); in removal of Postmasters.

Section 14 of the Veterans Preference Act limits the President to removal of Postmasters only for "such cause as will promote the efficiency of the service." It is obvious from a reading of 39 U.S.C. 31(a) that Congress intended to restrict the President's power to remove Postmasters and confer on the appointed incumbent a statutory tenure. Congress has similarly limited the President's removal power as to other appointed officials. For example, the 1926 law creating the National Mediation Board, 44 Stat. 579, 45 U.S.C. 154, provides that a member can only be "removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause." In 1935 the act creating the

National Labor Relations Board, 49 Stat., 29 U.S.C. 153(a), used substantially the same language. When Congress created the Maritime Commission in 1936, 49 Stat. 1985, 46 U.S.C. 1111(a), it provided that "Any member may be removed by the President for neglect of duty or malfeasance in office." The 1938 Act creating the Civil Aeronautics Board, 52 Stat. 980, 49 U.S.C. 421, uses similar language, as does the 1946 Act establishing the Atomic Energy Commission, 60 Stat. 756, 42 U.S.C. 1802(a)(2). The Indian Claims Commission Act of 1946, 60 Stat. 1050, 25 U.S.C. 70(b) provides that members shall hold office during good behavior, and can only be "removed by the President for cause after notice and opportunity to be heard." The Subversive Activities Control Board members can be removed "by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause," as provided in the Act of September 23, 1950, 64 Stat. 997, 50 U.S.C. 791(a). It is apparently patterned after the limitation placed in 1921 on the President's power to remove the Comptroller General—stated grounds and "for no other cause and in no other manner except by impeachment." 42 Stat. 23, 31 U.S.C. 43. These statutes limit the President's discretion.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602, this Court held that when an act creating an agency provides for removal only for stated causes, the President cannot remove an incumbent at his discretion. Nonetheless, the court below insists on relying on *Keim* v. *United States*, 177 U.S. 290 (1900), and *Taylor* v. *Taft*, 24 App. D.C. 95 (1904), as authority clearly placing removal of executive department em-

ployees within the ambit of executive discretion. These cases stated the law 50 years ago, but not since the above referred to Acts of Congress, and reliance upon them is clearly wrong.

In its decision affirming petitioner's dismissal, the court below turns to *Hargett* v. *Summerfield*, 243 F. 2d 29, and *Saggau* v. *Young*, 240 F. 2d 865, both of which it uses to restate its view that "employee removal and discipline are almost entirely matters of executive agency discretion." There is nothing in the Veterans Preference Act to support such a proposition.

Petitioner contends that this is an erroneous statement of the law. Under Section 14 of the Veterans Preference Act, petitioner is entitled to remain in office until the President proves by substantial evidence on the whole record, that his dismissal is for a "cause" that will promote the efficiency of the service. Where an administrative ruling is "not supported by substantial evidence, it must be treated as having been arbitrary, capricious, or so grossly erroneous as to imply bad faith." *Wagner Whirler Corp.* v. *U. S.*, 121 F. Supp. 664. Review and clarification of this question by this Court is necessary to secure a national right and uniformity of judgments. All postmasters who are veterans are deprived of the benefits of the Veterans Preference Act under the present decisions.

II. The Court Below Misconstrues the Scope of Permissible Judicial Review as to Executive Removal of Postmasters.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602, at page 632, this court left open the question of scope of permissible review of executive personnel removal actions, and left such cases "for future con-

sideration." Whatever may be the limitations on judicial review of executive actions removing civil service personnel under the Lloyd-LaFollette Act and the Veterans' Preference Act, a different situation must arise when the employee is appointed and commissioned by the President with the consent of the Senate. Offices which Congress creates can have tenure beyond the President's discretion, if Congress so decides. These offices may have quasi-legislative and or quasi-judicial functions as well as functions purely executive. The agency offices referred to hereinabove are of that type. Congress has, for example, the responsibility under the Constitution to establish post offices: *Art. I, U.S. Const.* Congress has chosen to fix the tenure of Postmasters, even though it permits the President to appoint them. 39 U.S.C. 31(a). A fair reading of 39 U.S.C. 31(a) makes it clear that removal of Postmasters is no longer committed to executive discretion, but must be based only on cause. Whether or not there is cause is a question which must be determined by evidence on the whole record. If the President is free to determine cause, and have his decision remain beyond the pale of judicial review, there is no limitation on his discretion, and 39 U.S.C. 31(a) becomes a nullity.

Yet this is precisely the rule applied by the court below in petitioner's case, as may be seen from an examination of the law on which it relies. It certainly makes no pretense to have examined the administrative record to determine whether there was substantial evidence of cause for dismissal which would promote the efficiency of the service, as the statute requires. It makes no pretense to have reviewed the agency action for arbitrariness.

The confusion and lack of uniformity in judicial decisions may be seen in the reported cases. In *Suggan* v. *Young*, 240 F. 2d 865, the court below said, "this court has held many times that it will not review the action of executive officials in dismissing executive employees, except to insure compliance with statutory requirements." In *Boylan* v. *Quarles*, 235 F. 2d 834, there was no "substantial departure from applicable procedures, no misconstruction of governing legislation, nor any like error going to the heart of the administrative determination." In *Kohlberg* v. *Gray*, 207 F. 2d 35, the court would not "inquire into the guilt or innocence of the employee as to the charges upon which he was removed." See also *Levine* v. *Farley*, 107 F. 2d 186. In *Kutcher* v. *Gray*, 199 F. 2d 783, the court below said "administrative determination by the employing agency of what constitutes cause for discharge will not be judicially reviewed." See also *Carter* v. *Forrestal*, 175 F. 2d 364. In *Jordan* v. *United States*, No. 223-56 decided June 5, 1957, the Court of Claims holds "We do not inquire whether plaintiff was removed without cause if the procedure prescribed by the Lloyd-LaFollette Act has been followed." However, in *Knotts* v. *United States*, 121 F. Supp. 630, the Court of Claims holds that the scope of permissible review under 5 U.S.C. 652 extends to the question of "cause," as it had previously held in *Gadsden* v. *United States*, 78 F. Supp. 126.

Thus, it may be seen that the court below persists in applying the narrow scope of review suggested in the *Myers* case, while the Court of Claims oscillates between the review permitted in the *Humphrey's* case and the *Myers* case. Neither court seems to give effect

to the distinction between appointments made by the President, and those made by inferior officers, and the cognizable limitations on the power of removal, as set forth in *United States* v. *Perkins*, 116 U.S. 483.

In the *Myers* case, supra, the restrictions on the President's power to remove a Postmaster provided in 39 U.S.C. 31 were held unconstitutional. The valid portion of this law remained in effect from 1876 until 1938, when a new restriction on the President's power to remove was provided in 39 U.S.C. 31(a). If Postmasters have quasi-legislative and quasi-judicial functions (39 U.S.C. 225, as explained in *Esquire* v. *Walker*, 55 F. Supp. 1015, rev. on other grounds 151 F. 2d 49), it would seem that the *Humphrey's* case, supra, rule would bind the court below to extend the scope of permissible review to a determination of whether petitioner's removal for cause is supported by substantial evidence on the whole record. Otherwise there is no check on the President's discretion or review to see whether he limits removals to the causes stated in 5 U.S.C. 863. Either the limitation of the President's power to remove Postmasters in 39 U.S.C. 31(a) is unconstitutional, as this Court determined its predecessor (39 U.S.C. 31) to be, or petitioner is entitled to the same scope of judicial review of his dismissal as would be the case in any other administrative proceeding. Petitioner urges the Court to clarify the rights of Postmasters under 39 U.S.C. 31(a) and to define the scope of judicial review to which they are entitled when dismissed for alleged cause to promote the efficiency of the service.

Despite the persistent decisions of the court below, as cited hereinabove, holding that the question of

"cause" under Section 14 of the Veterans Preference Act is non-reviewable, there is nothing in the statute to justify this position. This court has never passed upon the question. If, despite the *Myers* case, supra, 39 U.S.C. 31(a) is constitutional, then due process requires reviewability of the question of cause to determine whether it is based on evidence and is not arbitrary. Title 39 U.S.C., Section 31(a), limits executive discretion, and brings into play Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009), requiring judicial review. In the light of 39 U.S.C. 31(a), 5 U.S.C. 863, and 5 U.S.C. 1009, the decision of the court is clearly wrong, and deprives petitioner and all other Postmasters who are veterans of a national right.

III. The Assistant Postmaster General Had No Authority to Dismiss Appellant.

Appellant was appointed by the President by and with the consent of the Senate. The President has never delegated his authority to dismiss postmasters to the Assistant Postmaster General. The *Hargett* case, supra, relied on in the case at bar, holds that there is a presumption of authority to act. Appellant contends there can be no such presumption as to the Assistant Postmaster General.

IV. The Administrative Procedure Act Applies to Federal Personnel Actions.

The court below holds in the *Hargett* case, which is the basis for its decision in the case at bar, that the removal of executive agency employees is a matter of discretion and not subject to the judicial review provisions of the Administrative Procedure Act. Appellant contends it is. *Laden* v. *Crossen*, 108 F. Supp.

240; *Fischer* v. *Haeberle*, 80 F. Supp. 652; *Wettre* v. *Hague*, 74 F. Supp. 396; and see also *Blackmar* v. *Guerre*, 342 U.S. 512; *Hargett* v. *Summerfield*, 243 F. 2d 29. The decisions are in clear conflict and should be made uniform.

CONCLUSION

Petitioner respectfully submits that the case at bar involves a question of national rights and uniformity of judgments, and requests that a writ of certiorari issue to the court below to review the case. The pertinent statute dealing with the removal of a Postmaster of the first class has not been reviewed by this Court. As set forth hereinabove, there are special and important reasons for granting certiorari in this case in accordance with Rule 38(5)(c) of this Court's Rules.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 13558

JAMES J. MORONEY, APPELLANT

v.

N. R. ABRAMS, Assistant Postmaster General, *et al.*,
APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided May 9, 1957

Mr. Carl L. Shipley, and *Mr. Samuel Resnicoff* of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, for appellant.

Mr. Howard E. Shapiro, Attorney, Department of Justice, for appellees. *Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, *Samuel D. Slade* and *Alan S. Rosenthal*, Attorneys, Department of Justice, were on the brief for appellees.

Before EDGERTON, *Chief Judge*, and PRETTYMAN and WILBUR K. MILLER, *Circuit Judges*.

PER CURIAM: The judgment of the District Court is affirmed. *Saggau* v. *Young*, —— U.S. App. D.C. ——, 240 F. 2d 865; *Hargett* v. *Summerfield*, —— U.S. App. D.C. ——, —— F. 2d —— (No. 13169, decided March 21, 1957), *affirming* 137 F. Supp. 876; *Williams* v. *Cravens*, 93 U.S. App. D.C. 380, 210 F. 2d 874.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,161

HENRY A. C. SAGGAU, APPELLANT

v.

PHILIP YOUNG, et al., Commissioners of Civil Service, and ARTHUR E. SUMMERFIELD, Postmaster General, APPELLEES.

Appeal from the United States District Court for the District of Columbia

---

Decided December 27, 1956

Mr. Joseph Robbie, Jr., of the bar of the Supreme Court of Minnesota, *pro hac vice*, by special leave of court, for appellant. *Mr. Max M. Kampelman* was on the brief for appellant. *Mr. Arthur Lazarus, Jr.*, also entered an appearance for appellant.

Mr. Milton Eisenberg, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Lewis Carroll*, Assistant United States Attorney, and *Robert L. Toomey*, Assistant United States Attorney at the time brief was filed, were on the brief, for appellees. *Mr. Leo A. Rover*, United States Attorney at the time record was filed, also entered an appearance for appellees.

Before FAHY, WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: Appellant, Saggau, brought a civil action in the United States District Court for the District of Columbia asking that the court declare invalid the proposed removal of appellant from his office as postmaster at Ceylon, Minnesota, and that the charges against him be dismissed and expunged from his employment record.

It appears that letters of charges were filed against him by the Post Office Department, to which he duly replied; and, after consideration by the Department of the evidence submitted, including appellant's reply, he was ordered removed from his position. He thereupon appealed to the Ninth Regional Office of the Civil Service Commission, which, after hearing, affirmed the action of the agency; and he appealed, in turn, to the Civil Service Commission, which affirmed the action of the Regional Office.

This civil action was then instituted and, on motion, summary judgment was entered for appellees.[1]

This case clearly falls within that line of cases in which this court has held many times that it will not review the action of executive officials in dismissing executive employees, except to insure compliance with statutory requirements.[2] As in *Boylan* v. *Quarles*, —— U.S. App. D.C. ——, 235 F. 2d 834 (1956), there was here "[n]o substantial departure from applicable procedures, no misconstruction of governing legislation, nor any like error going to the heart of the administrative determination. . . ."

Appellant alleges further that the charges were "picayunish" and inspired by political considerations; and

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[1] Memorandum opinion of Judge McGarraghy is reported in *Saggau* v. *Young*, 138 F. Supp. 140 (1956).

[2] See, *e.g.*, *Blackmon* v. *Lee*, 92 U.S. App. D.C. 268, 205 F. 2d 13 (1953); *Carter* v. *Forrestal*, 85 U.S. App. D.C. 53, 175 F. 2d 364 (1949), *cert. denied*, 338 U.S. 832.

that, his removal having been for political reasons, it was prohibited by Civil Service regulations. Even assuming *arguendo*[3] that there was any reliable evidence that the charges were of such nature, this matter was investigated by the Regional Office and by the Civil Service Commission. Both held that the evidence of record disclosed that the decision of the Department in removing him was not unreasonable, arbitrary or capricious but was for such cause as would promote the efficiency of the service within the meaning of the Veterans' Preference Act, and that the evidence did not establish that appellant's removal was for political reasons, as prohibited by Civil Service regulations. We find no error.

We have examined the other contentions urged by appellant and find no error affecting substantial rights.

Affirmed.

[3] The scant evidence submitted by appellant to show the alleged political nature of the charges was entirely hearsay. After investigation which we think was procedurally correct, the Ninth Regional Office concluded that "Mr. Prull's hearsay testimony is not sufficient to warrant a conclusion that the adverse action was taken for political reasons rather than for the reasons stated in the letter of adverse decision." This was affirmed by the Civil Service Commission.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,169

NEWELL M. HARGETT, APPELLANT

v.

ARTHUR E. SUMMERFIELD, et al., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided March 21, 1957

Mr. John R. Foley for appellant.

Mr. Milton Eisenberg, Assistant United States Attorney, with whom *Messrs. Oliver Gasch,* United States Attorney, *Lewis Carroll,* Assistant United States Attorney, and *Robert L. Tooney,* Assistant United States Attorney at the time brief was filed, were on the brief, for appellees. *Mr. Leo A. Rover,* United States Attorney at the time record was filed, and *Mr. Frank N. Strickler,* Assistant United States Attorney at the time record was filed, also entered appearances for appellees.

Before FAHY, WASHINGTON and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* Appellant filed suit in the United States District Court asking that appellees be enjoined from removing him from his position as postmaster of the first class at Maysville, Kentucky, and that the removal action and decision against him be declared unlawful and void.

Letters of charges were filed by the Post Office Department against appellant, who is a Veterans' Preference

eligible. To these charges he made a timely reply and, thereafter, he was ordered removed from his position. He appealed to the Sixth Regional Office of the Civil Service Commission, which, after hearing, affirmed the action of the Post Office Department. On further appeal to the Civil Service Commission, the decision of the regional office was affirmed. This civil action was then filed and, on motion of appellees, summary judgment was entered in their favor.

In this court appellant raises two points: First, he says that only the President can remove a postmaster of the first class appointed by the President and confirmed by the Senate, and that, since the President has not participated in or ratified his removal, such action was therefore void. Secondly, he contends that the judicial review provisions of the Administrative Procedure Act[1] permit the courts to review administrative determinations in employee removal proceedings on the substantive merits.

As to the first contention: it is true that postmasters of the first class are appointed by the President. Previously it was provided by statutes that postmasters of the first, second and third classes were to be appointed by the President and were to hold office for four years, unless sooner removed or suspended by the President. The present statute, 39 U.S.C. § 31(a) (1952), provides that postmasters of the first, second and third classes are to be appointed in the *classified* service, without term, by the President, by and with the advice and consent of the Senate. It was provided also that the Veteran's Preference Act, 5 U.S.C. § 851-869 (1952), should apply to such appointments. Therefore appellant is removable in accordance with the same procedures as any other classified civil service employee and Veterans' Preference eligible. The record is clear that appellant was accorded all of the procedural protection provided by the applicable statutes.

[1] 5 U.S.C. §§ 1001-1011 (1952).

While it may technically be true that only the President has power to remove a postmaster, since the power to remove is incident to the power to appoint, *Burnap* v. *United States*, 252 U.S. 512, 519 (1919), the act of the Postmaster General here will be presumed to be the act of the President. *United States* v. *Farden*, 99 U.S. (9 Otto) 10, 19 (1878); *The Confiscation Cases*, 87 U.S. (20 Wall.) 92, 109 (1873). The decision in *Myers* v. *United States*, 272 U.S. 52 (1926), principally relied upon by appellant, affords him no support. In that case the President removed the postmaster. The Court sustained his right to do so without the advice and consent of the Senate to the removal.

We turn now to appellant's second contention, namely, with regard to the alleged effect of the judicial review provisions of the Administrative Procedure Act in civil service cases. That Act provides:

> "Except so far as . . . agency action is by law committed to agency discretion . . . [a]ny person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U.S.C. § 1009 (a).

The question, whether removal of executive agency employees is a matter "by law committed to agency discretion", must therefore be considered at the outset.

The Supreme Court, in *Keim* v. *United States*, 177 U.S. 290 (1900), considered whether or not the courts may supervise the acts of an executive department head in discharging an employee. The Court's decision in that case clearly placed the removal of executive department employees within the ambit of executive discretion, and ruled that until Congress, by "special and direct legislation makes provision to the contrary", the courts could not review the soundness or propriety of the exercise of the department head's discretion.

In *United States ex rel. Taylor v. Taft*, 24 App. D.C. 95, 98 (1904), this court pointed out:

> "The question of fitness, capacity, attention to the duties of an officer, is necessarily to be determined by the heads of the departments; this determination is only arrived at by the exercise of discretion and judgment . . . ."

These cases and others of similar import, decided both before and after the passage of the Administration Procedure Act in 1946, make it clear that employee removal and discipline are almost entirely matters of executive agency discretion, and that judicial review of such actions is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation. This has resulted in an unbroken line of authorities holding that, so long as there was substantial compliance with applicable procedures and statutes, the administrative determination was not reviewable as to the wisdom or good judgment of the department head in exercising his discretion. See, *inter alia*, *Keyton v. Anderson*, 97 U.S. App. D.C. 178, 229 F. 2d 519 (1956); *Williams v. Cravens*, 93 U.S. App. D.C. 380, 210 F. 2d 874 (1954), *cert. denied*, 348 U.S. 819; *Kohlberg v. Gray*, 93 U.S. App. D.C. 97, 207 F. 2d 35 (1953), *cert. denied*, 346 U.S. 937; *Blackmon v. Lee*, 92 U.S. App. D.C. 268, 205 F. 2d 13 (1953); *Powell v. Brannan*, 91 U.S. App. D.C. 16, 196 F. 2d 87 (1952); *Carter v. Forrestal*, 85 U.S. App. D.C. 53, 175 F. 2d 364 (1949), *cert. denied*, 338 U.S. 832.

Limited as to scope of review by the decisions cited above, we have examined all the points and arguments urged by appellant. Here there was clearly an adequate basis for the exercise of discretion, and that discretion was exercised. We find no error or failure to comply with applicable statutory procedures, or other error cognizable within the scope of permissible review.

Affirmed.

OFFICE-SUPREME COURT, U.S.
FILED
SEP 3 1957
JOHN T. FEY, Clerk

No. 339

In the Supreme Court of the United States

October Term, 1957.

JAMES J. MAHONEY, *Petitioner*,

v.

J. M. McKIBBEN, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1957

No. 339

JAMES J. MORONEY, *Petitioner*

v.

J. M. McKIBBEN, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a) is reported at 244 F. 2d 21.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1957. The petition for a writ of certiorari was filed on August 2, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the merits of a removal action, effectuated in full compliance with applicable statutory procedures, are subject to judicial review.

2. Whether the removal of petitioner from his position as postmaster could be accomplished by the Post Office Department through normal civil service procedures and without the personal action of the President.

3. Whether the Administrative Procedure Act conferred jurisdiction to review the substantive merits of a federal employee's dismissal which was valid under applicable procedures.

STATUTES INVOLVED

Act of June 25, 1938, Sec. 1 (52 Stat. 1076, 39 U.S.C. 31a):

> Postmasters of the first, second, and third classes shall hereafter be appointed in the classified service without term by the President by and with the advice and consent of the Senate * * *

Veterans' Preference Act of 1944, Sec. 14 (58 Stat. 390, 5 U.S.C. 863):

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, * * * shall be discharged * * * except for such cause as will promote the efficiency of the service * * *

Administrative Procedure Act, Sec. 10 (60 Stat. 243, 5 U.S.C. 1009):

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * *

STATEMENT

This is a suit challenging petitioner's dismissal from the federal civil service for failure to attend to duty.

On January 14, 1955, petitioner, a first class postmaster in charge of the Post Office at Pleasantville, New York, was served with a notice that the Post Office proposed to separate him for devoting substantial periods of time to his private affairs during business hours (J.A. 4-6).[1] Petitioner made a written reply to the charges against him (J.A. 84-87) but, on April 22, 1955, was notified by the Assistant Postmaster General that the charges were sustained and that he would be removed (J.A. 3-4). He was also advised that, as a veterans' preference eligible, he was entitled to appeal his dismissa to the Civil Service Commission (J.A. 4).

Petitioner appealed to the Second Regional Office of the Civil Service Commission, which conducted a full hearing as required by the Veterans' Preference Act (J.A. 91-100). The Regional Office determined that the Post Office Department's charges were not sustained by the evidence and ordered petitioner's reinstatement (J. A. 99). The Post Office Department appealed to the Board of Appeals and Review of the

[1] In this brief, J.A. designates the Joint Appendix filed by the parties in the Court of Appeals.

Civil Service Commission which reversed the Regional Office stating: "The evidence establishes that Mr. Moroney spent considerable time in the office of his private business on the dates cited in these charges, and it is only reasonable to believe that he was not engaged in postal business during that time."[2]

On June 1, 1956, petitioner filed this suit for declaratory judgment and injunctive relief in the United States District Court for the District of Columbia challenging the legality of his dismissal (J.A. 1-3). An attempt in this suit to enjoin his impending dismissal was unsuccessful (J.A. 13-15), and he was discharged from his position on August 2, 1956.

On July 25, 1956, the District Court granted without opinion respondents' motion for summary judgment (J.A. 16). Upon appeal to the Court of Appeals for the District of Columbia Circuit, this judgment was affirmed, *per curiam*, upon the authority of *Saggau* v. *Young*, 240 F. 2d 865; *Hargett* v. *Summerfield*, 243 F. 2d 29, certiorari denied, 353 U.S. 970; and *Williams* v. *Cravens*, 210 F. 2d 874, certiorari denied, 348 U.S. 819 (Pet. App. 1a).

ARGUMENT

Petitioner, a veterans' preference eligible, was dismissed from his position as a postmaster in the classified civil service upon charges of failing to attend to his duties during office hours. The Post Office decision to discharge him was reviewed by the Civil Service Commission which, after a full hearing on the charges, sustained the order of dismissal.

---

[2] The decision by the Board of Appeals and Review of the Civil Service Commission, which is part of the record below but was inadvertently omitted from the Joint Appendix, is set forth in full in the appendix to the appellees' brief in the Court of Appeals.

In addition to this review, the procedural validity of his discharge has been examined and sustained by the District Court and the Court of Appeals for the District of Columbia Circuit. He now seeks further review by this Court on grounds substantially the same as those in *Hargett* v. *Summerfield*, 243 F. 2d 29, in which this Court denied certiorari, 353 U.S. 970. We submit that the Court of Appeals correctly disposed of this case on the authority of its decision in *Hargett* v. *Summerfield*, and that further review is not warranted.[3]

1. In *Hargett* v. *Summerfield*, *supra*, the Court of Appeals restated the familiar principle "that employee removal and discipline are almost entirely matters of executive discretion, and that judicial review of such actions is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation" (Pet. App. 8a). Despite the line of authority in support of this proposition—much of it involving the Veterans' Preference Act—petitioner contends that this principle conflicts with Section 14 of that Act, which provides for the removal of veterans only for "such cause as will promote the efficiency of the service" 5 U.S.C. 863. Petitioner was removed, however, on a charge which obviously meets the statutory test—failure to attend to his duties during office hours. His argument, therefore, amounts to nothing more than a complaint that the evidence does not support the charge; and that

[3] We respectfully refer the Court to our brief in opposition in *Hargett*, No. 945, Oct. Term, 1956, wherein the reasons for denying review are set forth in further detail.

the Court of Appeals should have reviewed that evidence. The "unbroken line of authority," to which the Court of Appeals referred in *Hargett* (Pet. App. 8a), demonstrates the lack of substance in petitioner's contention. See, e.g., *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; *Williams* v. *Cravens*, 210 F. 2d 874 (C.A.D.C.), certiorari denied, 348 U.S. 819; *Kohlberg* v. *Gray*, 207 F. 2d 35 (C.A.D.C.), certiorari denied, 346 U.S. 937; *Powell* v. *Brannan*, 196 F. 2d 871 (C.A.D.C.); *Carter* v. *Forrestal*, 175 F. 2d 364 (C.A.D.C.), certiorari denied, 333 U.S. 832.[4]

Despite this clear authority to the contrary, petitioner argues that the Court of Appeals should have reviewed the merits of his dismissal under *Humphrey's Executor* v. *United States*, 295 U.S. 602. His argument seems to be that the terms of the Veterans' Preference Act, taken together with the act extending civil service status to postmasters (39 U.S.C. 31(a)), puts him in the same status as the Federal Trade Commissioner involved in the *Humphrey* case. This argument is extremely difficult to follow. First, the *Humphrey* decision does not apply to postmasters, but to officials occupying quasi-judicial or quasi-legislative offices. Indeed, this Court in *Humphrey* expressly distinguished postmasters from such officials. 295 U.S. 602, 627. Second, the *Humphrey* case was not concerned with review of the evidence in support of a dismissal, but with the power of the President to remove a quasi-

[4] *Knotts* v. *United States*, 121 F. Supp. 630 (C. Cls.), cited by petitioner as conflicting with the foregoing, in fact restates this principle with approval. The validity of its further holding that the Court of Claims may review evidence of malice alleged to infect a discharge need not be considered here, since it does not conflict with the Court of Appeals' ruling on this record.

judicial official for causes other than those designated by Congress. Here, on the other hand, petitioner was removed from office for causes obviously within the applicable statute, and the merits of this removal have been thoroughly reviewed by the Civil Service Commission—the agency designated by Congress to supervise such dismissals. The *Humphrey* case has no application to dismissals effected through regular civil service channels.

2. Petitioner contends that his dismissal could not be effected by an Assistant Postmaster General because he was appointed by the President, with the consent of the Senate, and there can be no presumption that an Assistant Postmaster General acts for the President. However, it is well established that the President acts through the heads of departments in the executive branch. See, *e.g.*, *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *United States* v. *Farden*, 99 U.S. 10, 15; *Cearly* v. *Weeks*, 259 U.S. 336; *French* v. *Weeks*, 259 U.S. 326. Here, he acted through the Postmaster General.

The acts of Assistant Postmasters General "are the acts of the Postmaster General when confined within the scope of the duties assigned to them by their chief." *United States* v. *Warfield*, 170 Fed. 43, 45 (C.A. 4); to the same effect see *M'Collum* v. *United States*, 17 C. Cls. 92, 101-102. By Section 1 (b) of Reorganization Plan No. 3 of 1949, 63 Stat. 1066, the Postmaster General was authorized to "delegate to any officer, employee, or agency of the Post Office Department designated by him such of his functions as he deems appropriate"; referring specifically to this statutory provision, the Postmaster General, by Order No. 55064, 18 F.R. 8458, authorized the Assistant Postmaster Gen-

eral, Bureau of Post Office Operations, "* * * to take final action in his own name with respect to all transactions relating to personnel of the field postal service * * *." Section 823.1b of the Postal Manual states that this Assistant Postmaster General "[r]epresents and acts for the Postmaster General in the selection, appointment and discipline of postmasters."[5]

3. Finally, petitioner contends that the Administrative Procedure Act entitles him to judicial review of the merits of his dismissal. But, as was pointed out in *Wettre* v. *Hague*, 74 F. Supp. 396, 400 (cited by petitioner at page 12 of his petition): "Such a review is expressly omitted from the scope of the Administrative Procedure Act in cases involving matters of government personnel." Section 10(e) of the Act, which authorizes review of the substantiality of evidence supporting agency action (5 U.S.C. 1009(e)), applies only to adjudicatory hearings required under Section 5, which excepts from its coverage "(2) the selection or tenure of an officer or employee of the United States * * *." 5 U.S.C. 1004. Further, the determination of the factors which constitute "such cause as will promote the efficiency of the service," (5 U.S.C. 863) is a matter "by law committed to agency discretion." 5 U.S.C. 1009.

[5] In this connection, it might be noted that the current Directory of Post Offices lists a total of 23,496 post offices of the first, second, and third classes, all requiring Presidential appointment of their postmaster. Without such delegation as shown above, efficient administration of the Post Office Department would be impossible.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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September 1957.

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IN THE

Supreme Court of the United States

No. 339

JAMES J. MORONEY, *Petitioner*

v.

J. M. McKIBBEN, ET AL, *Respondents*

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

CARL L. SHIPLEY
SAMUEL RESNICOFF

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No. 339

JAMES J. MORONEY, *Petitioner*

v.

J. M. MCKIBBEN, ET AL, *Respondents*

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

James J. Moroney, by his attorneys Carl L. Shipley and Samuel Resnicoff, respectfully requests a rehearing of the order denying his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above captioned case on May 9, 1957.

STATUTES INVOLVED

5 U.S.C. 863

"* * * such preference eligible shall be allowed a reasonable time for answering the same [the

charges preferred against him] *personally and in writing.*" (Emphasis supplied).

5 U.S.C. 1009

(a) "Any person suffering legal wrong because of any agency action * * * shall be entitled to judicial review thereof."

(e) * * * the reviewing court shall * * * hold unlawful * * * agency action * * * found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * * (2) without observance of procedure required by law."

STATEMENT OF THE CASE

Petitioner was dismissed on charges on May 22, 1955 from his position as Postmaster, Pleasantville, New York, a position he had held since 1935. Petitioner received no hearing at the agency level. The Second Civil Service Region reversed petitioner's removal on grounds that the charges were not sustained, as follows:

U. S. CIVIL SERVICE COMMISSION
SECOND U. S. CIVIL SERVICE REGION
OFFICE OF THE DIRECTOR, NEW YORK, N. Y.

APPEAL OF JAMES J. MORONEY,
UNDER SECTION 14 OF THE VETERANS' PREFERENCE ACT OF 1944

Introductory Statement

Mr. Moroney appealed to this office on May 3, 1955 from the decision of the Post Office Department to effect his removal from the position of Postmaster, U. S. Post Office, Pleasantville, N. Y., effective thirty days from the receipt of the letter of decision (April 22, 1955) or as soon thereafter

as his successor could be installed, based on charges outlined hereafter.

Investigation was initiated by this office since appellant established his veterans preference and entitlement to appeal. During the investigation pertinent information was obtained from the Department's files and affidavits were secured from the appellant, Post Office officials and personnel and private citizens designated by the appellant. A statement was also obtained from the Assistant Postmaster General, Bureau of Post Office Operations relative to the Department's position in the case. A hearing was held in this office at the appellant's request on July 27, 1955 and a copy of the transcript of hearing is attached as part of this decision.

In reaching a decision in this case, consideration has been given to the record evidence and affidavit testimonies, as well as the hearing testimony, all of which has been made available for review and comment by the parties concerned.

Summary and Analysis of the Evidence

The appellant was advised by letter dated January 14, 1955 from Post Office Inspectors Myers and Bader of his proposed separation or other disciplinary action based upon three charges of violation of the provisions of Article 21, Chapter 1 of the Postal Manual, which requires that Postmasters at offices of the first class shall devote not less than eight hours during the business part of the day to the conduct of their offices and the performance of duties appropriate to their positions. The specifications of these charges were as follows:

(1) On August 25, 1954 he first arrived at the Post Office at 9:23 a.m. and departed at 11:00 a.m.; he returned to the Post Office at 3:36 p.m. and departed for the second time at 4:22 p.m.;

and he returned for the third time at 4:41 p.m. and departed at 5:19 p.m., spending a total of three hours and one minute at the Post Office. On the same day he was observed to spend four hours and sixteen minutes at the plumbing firm of James J. Moroney, Inc., 201 Tompkins Avenue, Pleasantville, N. Y., between the hours of 9:00 a.m. and 6:00 p.m.

(2) On September 2, 1954, he first arrived at the Post Office at 9:20 a.m. and departed at 10:37 a.m.; he returned to the Post Office at 2:10 p.m. and departed for the second time at 2:50 p.m.; he returned for the third time at 3:40 p.m. and departed at 3:47 p.m.; he returned at 5:10 p.m. and departed at 5:25 p.m.; and he returned for the last time at 5:33 p.m. and departed at 5:35 p.m., spending a total of two hours and twenty-one minutes at the Post Office. On the same day he was observed to spend two hours and five minutes at the firm of James J. Moroney, Inc., same address between the hours of 9:00 a.m. and 6:00 p.m.;

(3) On September 22, 1954, he first arrived at the Post Office at 11:03 a.m. and departed at 11:40 a.m.; he returned at 11:50 a.m. and departed for the second time at 12:05 p.m.; and he returned at 1:30 p.m. and departed at 2:45 p.m., spending a total of two hours and seven minutes at the Post Office. On the same day he was observed to spend three hours and fifteen minutes at the firm of James J. Moroney, Inc., same address, between the hours of 9:00 a.m. and 6:00 p.m.

The fourth charge stated that in an affidavit given on January 10, 1955, appellant stated he spent approximately eight hours daily between 9:00 a.m. and 6:00 p.m., Monday through Friday at the Post Office and their (the Inspectors') investigation disclosed this was not true.

The appellant replied on February 14, 1955 setting forth in detail the need for him to spend considerable time outside of the Post Office premises in the conduct of investigation to secure additional Post Office space, and stated that among the places he and Inspector Hartwell visited, was the J. J. Moroney Inc. warehouse which was under consideration for possible use. He stated that as a result of his daily survey in the surrounding area, a building was found that was under the control of the Reader's Digest and, as a result of his numerous visits to that company and their building, a contract was signed by their representative, Mr. Harry G. Wilcox on September 23, 1954. Insofar as the dates set forth in the charges were concerned, the appellant stated he kept no diary of his daily activities. He stated that the regulations do not require him to remain in the office at all times, if his work in the office has been properly taken care of and there are postal matters outside the office requiring his attention; further, as Postmaster, he could not reasonably be expected to remain at his desk or in his office eight full hours per working day and properly discharge his duties as Postmaster in serving the public.

The appellant was advised by letter dated April 22, 1955 from Mr. N. R. Abrams, Assistant Postmaster General, Bureau of Post Office Operations, that after consideration of the evidence submitted, including his reply, it had been decided the charges had been sustained and he would be removed as Postmaster effective thirty days from the receipt of the letter or as soon thereafter as his successor could be installed.

During the Commission's investigation, the following pertinent information and affidavits were obtained:

Copy of affidavit dated January 10, 1955 executed by the appellant in the presence of Inspectors

Myers and Bader. In this affidavit appellant stated that he is President of James J. Moroney, Inc., a plumbing and heating business, which was being conducted by his wife and son. His hours of duties at the Post Office are from 9:00 a.m. to 6:00 p.m., with lunch between 12:00 noon and 1:00 p.m. He stated "I usually spend approximately eight hours daily at the Post Office during weekdays (Mondays to Fridays); about six hours on Saturdays and two to three hours on Sundays. I find this is necessary because of shortage of manpower, supervisory and clerical." The appellant also stated that he had been at his place of business (plumbing and heating) sometime during the day between 9:00 a.m. and 6:00 p.m. while on his way to make bank deposits for the post office; further, that he had visited the Reader's Digest offices on several occasions and did not recall how much time he had spent there on Postal matters. He stated he does not permit his personal business to interfere with his being on duty at the Post Office.

In his initial affidavit to the Commission, dated May 27, 1955, the appellant stated that the four charges were based upon a claim that he devoted less than eight hours during the business part of the days mentioned to Post Office business. He repeated his previous statement concerning the need to perform duties outside of the Post Office, including his investigation for additional Post Office space, checking of the activities of mail trucks and Carriers, and checking of mail and parcel post routes. He stated his belief that the charges were actuated solely by reason of political expediency.

In a joint affidavit executed on May 11, and 12, 1955, Inspector Myers and Bader (respectively) stated they had the assignment to investigate the complaint that the appellant was not complying

with the regulation requiring him to spend not less than eight hours during the business part of the day in the conduct of the Post Office and the performances of appropriate duties. The basis for the three charges set forth above was the result of personal observations made by them. As an example of the appellant's activities on September 22, 1954 they stated that the appellant was observed at 2:50 p.m. to arrive at his place of business from which he left in his car at 3:03 p.m. and went to a residence where he picked up a man dressed in working clothes; that at 3:15 p.m. the appellant stopped at a construction job where a truck, with his firm name painted on the side, was parked and he left the workman off; that he left this location at 3:37 p.m. carrying a roll of blueprints and at 3.42 p.m. stopped in front of the Village Clerk's office into which he took the blueprints; and that he left the office of the Village Clerk and returned to his plumbing firm at 4:09 p.m., where he stayed until 5:05 p.m. and left for home without stopping at the Post Office. In referring to the fourth charge concerning the appellant's affidavit statement given on January 10, 1955, they stated their investigation disclosed the appellant's statement of spending approximately eight hours daily at the Post Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, was not true and they were unable to locate any person who would support the Postmaster's statement.

The statement of Mr. N. R. Abrams, Assistant Postmaster General, Bureau of Post Office Operations, dated June 23, 1955, addressed to the Commission pointed out that the appellant's reply to the charges did not deny the specific charges and the Department contended that the Inspectors' observations on the three cited dates proved conclusively that the appellant was not only absent from the Post Office during the hours he was required to perform his official duties but actually

performed certain business transactions in connection with his interest in the private business concern of James J. Moroney, Inc. The statement continued that the affidavits of employees in the Post Office, copies of which were furnished to the Commission, substantiated the charge that the appellant did not devote the required time to the performance of his official duties. The statement indicated that in view of the facts in the case and the evidence submitted, it could only be concluded the appellant had failed to devote the required time to the performance of his official duties and the Department would be remiss if it failed to remove him from the service.

Subsequent to the hearing, this office received a letter dated August 8, 1955 from Mr. H. B. Montague, Postal Inspector in Charge, New York Division, New York City, outlining the contents of the letter dated August 4, addressed to the Chief Inspector by Assistant Postmaster General Abrams quoted as follows: "All orders for the removal of Postmasters at first, second and third-class offices are by direction of the President. The order for the removal of Mr. Moroney as Postmaster at Pleasantville was by direction of the President."

* * * * * * *

It is considered that the Post Office Department has complied with the procedural requirements of the law and the regulations with respect to affording the appellant thirty (30) days' advance written notice of the proposed separation, opportunity to reply and consideration of his reply, and notice of final decision to effect his separation with the reasons therefor.

With respect to the question of the compliance with the requirement of specificity and detail in the proposed separation notice, it is considered that the first three charges were sufficiently specific to

apprise the appellant of the fact that he had been observed on three dates to spend a certain amount of time at his own business firm between the official hours of duty when he should have been devoting his time to Post Office business in accordance with the provisions of the Postal Manual. It is also considered that the fourth charge relative to the alleged falsity of the appellant's affidavit statement concerning the amount of time he spent at the Post Office was sufficiently specific, in the light of the three previous charges, to enable the appellant to submit a reply in his own defense.

In discussing the merits of the charges it is significant to note that prior to the hearing held in this office, the Department did not submit any record evidence in support of the four charges. The various affidavits which the Post Office Inspectors had obtained from Post Office employees do not contain any information to show that the employees had knowledge of the appellant's activities on the three dates cited in the charges; further, when interviewed during the Commission's investigation these same employees indicated their lack of knowledge concerning the facts related in the charges for those three dates.

The joint affidavit furnished by the Post Office Inspectors to the Commission indicated that the basis for the charges resulted from their personal observation; that on September 22, 1954 the appellant was observed at 2:50 p.m. to arrive at his place of business which he left at 3:03 p.m. and visited three other locations; that the appellant returned to his plumbing firm at 4:09 p.m. where he stayed until 5:05 p.m. and left for his home without stopping at the Post Office.

During the hearing, the testimony of the Inspectors was to the effect that they failed to keep any detailed notes concerning their observations of the appellant on the three dates in question.

As a result, neither of the Inspectors were in a position to testify as to the exact time on the three dates in question when the appellant may have been observed at the premises of his plumbing firm and by whom the observation was made. Their testimony would indicate that the hours and minutes cited in the charges were composite figures taken from their notes at the time the charges were prepared. The Inspectors' testimony also indicates that in actual fact the appellant was observed only either entering or leaving the premises of his business firm; that he was not observed inside those premises and he may have departed by a rear exit without the Inspectors' knowledge; and that the Inspectors could not testify to their knowledge whether or not the appellant was actually engaged in Post Office or personal business during the period of such observation. The testimony of Inspector Bader relative to his observation of the appellant on September 22, between the hours of 3:03 p.m. and 4:09 p.m., when the appellant made various visits away from his plumbing firm is not considered pertinent to the charge since it was not included in the charge and since it does not relate to the appellant's having been observed on the premises of his business firm.

The appellant apparently is unable to submit any evidence to explain his whereabouts on August 25 and September 2, 1954 and entered a general denial of the charges. Although not supported by corroborative evidence, the appellant testified that if September 2, 1954 occurred on a Thursday (as it did) he was certain that he attended the Rotary Luncheon at Mt. Kisco, N. Y., since he had a record of perfect attendance at such luncheons; that he would have to leave about 12:00 noon for the luncheon and would return about 2:00 p.m.; and that his attendance at the Rotary was in line with his official duties as Postmaster. However, with respect to his activities on September 22, 1954,

the appellant submitted in evidence a letter dated July 26, 1955 from the General Office Manager of the Reader's Digest indicating that a check of the latter's records reflected that on the morning of the date in question the appellant was in the latter's office for a conference concerning the rental of warehouse space for the Post Office Department; further, the latter's recollection is that the appellant was there somewhere in the neighborhood of 8:30 to 9:00 a.m. and the conference lasted about one hour and fifteen minutes. It is pertinent to note that, subsequent to the hearing, an affidavit statement was obtained from Mr. Wilcox attesting that the letter was signed by him and the contents were true to the best of his knowledge and belief.

The Inspectors' testimony indicated that if the appellant had attended the Rotary Luncheon that would be considered within the realm of official Post Office business; further, that the appellant was not under their surveillance if and when he went to Mt. Kisco and they could neither refute or corroborate his testimony. The Inspectors' testimony was to the effect that they do not recall or cannot now state whether the appellant was under their surveillance when he allegedly visited the premises of the Reader's Digest on the morning of September 22; further, Inspector Bader stated that he considered Mr. Wilcox, the General Manager, to be a reputable individual whose veracity would not be questioned.

In connection with the fourth charge alleging that the appellant's affidavit statement of January 10, 1955 that he spent approximately eight hours daily between 9:00 a.m. and 6:00 p.m., Monday through Friday at the Post Office, it is pertinent to note that the affidavit actually stated; "I usually spend approximately eight hours daily at the Post Office during weekdays (Mondays to Fridays; about six hours on Saturdays and two to three hours on Sundays. I find this is necessary because

of shortage of manpower, supervisory and clerical." Since the appellant's affidavit was summarized out of context in preparing the charge and the word "usually" was omitted from the charge, it is considered that this charge cannot be sustained since it does not contain a true statement of facts.

In view of the above, after considering all of the evidence of record, it is the opinion of this office that the Post Office Department has failed to affirmatively support the charges alleging that the appellant was observed to have spent the specified times at his own business firm conducting other than official Post Office business on the three dates in question. The testimony of the Inspectors acknowledges that a Postmaster may be required to conduct official Post Office business outside of the Post Office premises.

Under the circumstances, since none of the charges is sustained, it is the opinion of this office that the appellant's removal from the service would be improper and not for such cause as would promote the efficiency of the service within the meaning of the language of Section 14 of the Veterans' Preference Act.

Findings and Recommendations

It is the finding of this office, based on all of the evidence of record, that the Post Office Department's decision to effect the appellant's removal from the position of Postmaster was improper and was not based upon sustained charges.

It is recommended, therefore, that the Department take the necessary action to cancel it. decision to remove the appellant. This memorandum constitutes the authority to take the recommended action.

No appeal from this decision will be considered unless it is submitted to the Chairman, Board of

Appeals and Review, U. S. Civil Service Commission, Washington 25, D. C., within seven (7) days after receipt of this decision. Notification of a further appeal should be given to this office so the case files can be transmitted promptly to the Commission.

Since there is no further right to a hearing, additional representations should be made in writing and submitted in duplicate with the appeal to the Commission.

The Post Office Department will please notify this office of the action taken or proposed to be taken in Mr. Moroney's case within seven (7) days after receipt of this decision.

JOHN A. GALVIN
Appeals Examiner

JAMES P. GOOGE
Regional Director

Attachments:
Transcript of Hearing
August 29, 1955

On May 15, 1956 the Civil Service Commission Board of Appeals and Review reversed the Second Region on grounds that the evidence sustained the charges. It had nothing before it but the record. Reversal of the Second Civil Service Region was arbitrary.

None of the evidence adduced at the Civil Service hearing was ever before the Post Office Department.

ARGUMENT

Under the Veterans Preference Act of 1944, 5 U.S.C. 863, petitioner was entitled to an agency hearing and a Civil Service hearing on the charges made against him. Section 14 of the Act provides that veterans shall have an opportunity to answer a proposed

reduction in rank and compensation "personally and in writing" at the agency level. The language is mandatory, and does not depend upon a specific request. As stated in *Washington* v. *U. S.*, 147 F. Supp. 284, "the phrase 'personally and in writing' is clear and unambiguous. It means exactly what it says." Petitioner was given no such personal hearing. This Court has said veterans legislation is to be construed liberally. *Fishgold* v. *Sullivan Drydock & Engineering Corp.*, 328 U.S. 275, 286, 287; *Boone* v. *Lightner*, 319 U.S. 561. The very purpose of the Act is to give "preference" to veterans, and that construction of the law which gives effect to the statutory remedy must be followed. Petitioner is a veteran. The Post Office Department had an affirmative duty to hold a personal hearing on the charges. It did not do so. Petitioner never had an effective opportunity to challenge the charges and meet the witnesses against him at the agency level in person and testify in person.

Petitioner had a hearing before the Civil Service Commission, as required by Section 14, but that does not cure the defect of lack of agency hearing. *Wittner* v. *U. S.*, 110 Ct. Cls. 231; *Washington* v. *U. S.*, 147 F. Supp. 284.

The Administrative Procedure Act requires a reviewing court to hold unlawful agency action which is "without observance of procedure required by law." 5 U.S.C. 1009 (e). This clear Congressional direction requires the Court to review the record for compliance with statutory procedures. This Court has reserved opinion on the applicability of the Administrative Procedure Act to federal employee actions. *Blackmar* v. *Guerre*, 342 U.S. 512. Other courts have held that it does apply. *Ladeu* v. *Crossen*, 108 F. Supp. 240;

Fischer v. *Haeberle*, 80 F. Supp. 652; *Wettre* v. *Hague*, 74 F. Supp. 396. Cf. *Hargett* v. *Summerfield*, 243 F. 2d 29. If application of that Act to veterans is favorable, they should have the preference of its application.

In his personal appearance before the Second Civil Service Region, petitioner was able to persuade the examiner that the charges were unsupported by evidence. Had he had such an opportunity at the Post Office Department level, he might have done likewise. Congress clearly provided that he should have that opportunity. He was not given it, and has lost substantial rights thereby. As stated in *Stringer* v. *U. S.*, 138 F. Supp. 271:

> "It seems rather strange that department officials are sometimes reluctant to follow the simple requirements of an Act of Congress. Perhaps it is pride in a decision already rendered, or a desire not to acknowledge a mistake. At any rate, they sometimes seem to acknowledge the necessity of a concession grudgingly rather than openly and willingly, to make the barest sort of correction rather than a real compliance.
>
> There is nothing ambiguous about the Veterans Preference Act. Rightly or wrongly, it was enacted by the Congress in recognition of the great sacrifices of those who had an active part in our national defense at times when everything we cherish was at stake."

CONCLUSION

In the light of the above, it is submitted that this Court should grant a writ of certiorari in the above entitled case.

CARL L. SHIPLEY
SAMUEL RESNICOFF
Attorneys for Petitioner

We, Carl L. Shipley and Samuel Resnicoff, Counsel for Petitioner, do hereby certify that the foregoing Petition For Rehearing Of Order On Petition For Writ Of Certiorari is presented in good faith, not for delay, and that the petition is restricted to the grounds specified in Rule 58 of the Revised Rules of the Supreme Court of the United States. (Paragraph 2)

CARL L. SHIPLEY

SAMUEL RESNICOFF